Ontario

BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Tammy Turnbull dated November 19, 1993, alleging discrimination in employment on the basis of sex.

B E T W E E N :

Ontario Human Rights Commission

- and -

Tammy Turnbull

Complainant

- and -

539821 Ontario Ltd. - Andre's Restaurant,
Andre Favuzzi and Mark Favuzzi

Respondents

DECISION

Adjudicator : Mary Anne McKellar

Date : 21 June, 1996

Board File No: BI-0071-95

Decision No : 96-020

Board of Inquiry (*Human Rights Code*)
150 Eglinton Avenue East
5th Floor, Toronto ON M4P 1E8
Phone (416) 314-0004 Fax: (416) 314-8743 Toll free 1-800-668-3946

APPEARANCES

Ontario Human Rights Commission	)	Stephen J. Wojciechowski Counsel
Tammy Turnbull	)	On her own behalf
Andre Favuzzi and Mark Favuzzi	)	Eugene Prpic Counsel
539821 Ontario Ltd, Andre's Restaurant	)	Eugene Prpic Counsel

INTRODUCTION

This decision deals with a complaint by Tammy Turnbull ("the Complainant") that the Corporate Respondent, 539821 Ontario Ltd. Operating as Andre's Restaurant, ("Andre's Restaurant") and the two individual Respondents, Andre Favuzzi and Mark Favuzzi, discriminated against her in her employment contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended ("the *Code*"). Specifically, the Complainant alleges that she was discriminated against on the basis of sex when the Respondents reduced her hours of work and then terminated her employment shortly after she advised them that she was pregnant.

THE FACTS

The following recitation of the facts is based on the testimony of the Complainant, Caron Moffet, Amy Fiset, Ginette Brink, Andre Favuzzi and Mark Favuzzi, and on various documents identified by these witnesses or introduced on agreement of the parties. Where there was a significant disparity in the witnesses' accounts of facts and events requiring me to make a credibility finding, I indicate the nature of the disparity; my finding with respect to credibility, and the reason for that finding.

The Complainant worked at Andre's Restaurant for one year, from March 23, 1992 until March 20, 1993. Her duties are described in detail below. For now it is sufficient to note that she was one of a roster of wait staff working at the restaurant.

Andre's Restaurant is a small dining establishment located in downtown Thunder Bay. The Respondent Andre Favuzzi is the sole shareholder of the Corporate Respondent. He also "runs" Andre's Restaurant on a day-to-day basis. His chief duties include food preparation in advance of the restaurant opening; opening and closing the restaurant; cooking the food orders; operating the cash register; and overseeing the wait staff, including preparing their work schedules.

Mark Favuzzi is Andre Favuzzi's son. Andre and Mark started Andre's Restaurant together, and both acknowledged in testimony that Mark Favuzzi worked full-time in the restaurant from approximately 1983 until 1987. During the period of the Complainant's employment at Andre's Restaurant, Mark was employed full-time at Great Lakes Forest Products. He was nevertheless present in Andre's Restaurant on an almost daily basis. The length of time he spent in the restaurant varied from day to day. While in the restaurant he would visit with his father and chat with the customers. At times, he would also help his father with the cooking and operate the cash register. Occasionally Mark Favuzzi prepared work schedules for the wait staff and offered direction to them with respect to their duties. He regularly reconciled payroll records for the accountant, who prepared pay cheques based on those records. For a few weeks during the Complainant's employment, Mark Favuzzi "ran" the restaurant while Andre was out of the country. Mark Favuzzi was not on the payroll of Andre's Restaurant.

Teresa Favuzzi, who is Andre's wife and Mark's mother, was also present in the restaurant on an almost daily basis. In addition to chatting to the customers and drinking coffee, she would pitch in and help when the restaurant was busy by operating the cash register or wiping down the odd table. Teresa Favuzzi was not on the payroll of Andre's Restaurant.

Although the identity of the individual women changed, the number of wait staff employed at Andre's Restaurant remained fairly constant throughout the Complainant's employment. Either four or five women were employed on a rotating basis. Witnesses Moffet, Fiset and Brink worked as wait staff at Andre's Restaurant during the currency of the Complainant's employment. There were three shifts per day, and one woman worked each shift. In a typical week, each woman would work some morning, some afternoon and some evening shifts. Depending on the size of the lunch crowd, the morning and afternoon shift might overlap for a short period. These were the only occasions when two wait staff might be working tables at the same time. The restaurant was never operated without wait staff.

Each work schedule for the wait staff covered a two-week period. These schedules were normally prepared and posted in the restaurant the week-end prior to the commencement of the new schedule. The Complainant's number of shifts averaged 8 and her hours of work averaged 35 over each two-week period. Her rate of pay was $6.00 per hour, plus tips. The tips averaged $10.00 per shift.

Waiting tables, busing tables and washing dishes were duties common to all three shifts, and the Complainant characterized them as the "core" duties of her job. Other duties were unique to each shift. The woman working the evening shift was expected to mop the floor. The mop provided for this purpose was a large industrial one. On a typical day, approximately three cases of beer would be consumed by the customers of Andre's Restaurant. The women working the morning and evening shifts were expected to keep the beer refrigerator filled. This involved taking empty beer cases to the storage area of the restaurant, and carrying full beer cases from the storage area to the beer refrigerator.

The Complainant is an unmarried woman. She discovered that she was pregnant in October, 1992, and confided in a co-worker, but requested that neither the Respondents, nor Teresa Favuzzi, be told of her condition. Her rationale for concealing the fact of her pregnancy from the Respondents was a desire to avoid any negative repercussions such a disclosure might precipitate. In particular, the Complainant was concerned because she had frequently heard Teresa Favuzzi making disparaging comments about single or unwed mothers among the restaurant's clientele and suggesting that these women chose to become pregnant as a means of obtaining social assistance. The Complainant and other of her co-workers who testified before me indicated that these and similar remarks were made by Teresa Favuzzi in the presence of her husband.

It is unclear exactly how the Respondents first became aware of the Complainant's pregnancy. The Complainant testified that she first acknowledged being pregnant in response to a direct question by Mark Favuzzi at the end of February, 1993. The testimony of Andre and Mark Favuzzi

indicated that the Complainant's co-workers may actually have been the first source of their knowledge of the pregnancy. In any event, neither Mark nor Andre Favuzzi took exception to the Complainant's evidence as to when they became aware of her pregnancy. I find that they became aware of it towards the end of February, 1993.

In accordance with the usual practice at Andre's Restaurant, the work schedule for the two-week period commencing Monday, March 8, 1993 was posted on the preceding weekend. Instead of indicating all shift assignments for the two-week period, however, the schedule contained shift assignments for the first three days only. During the entire two-week period, shifts continued to be assigned a day or two at a time. The Complainant, and presumably her co-workers as well, had to drop into the restaurant or call to find out when they were scheduled to work. From March 8, 1993 until March 14, 1993, the Complainant was assigned to two shifts, and worked a total of 6.5 hours. She was also assigned to two shifts between March 15, 1993 and March 21, 1993, and worked a total of 7.5 hours.

The Complainant did not work again at Andre's Restaurant. The circumstances surrounding and the reasons for the termination of her employment were the most hotly disputed aspect of the evidence. The Complainant's Record of Employment ("ROE") indicates as the reason for the cessation of her employment, "pregnancy". It also indicates that Mark Favuzzi was the contact person in the event of any questions arising with respect to the contents of the ROE.

The Complainant testified that during her shift on March 17, 1993, she asked Mark Favuzzi why she had been assigned so few shifts, and that he responded that: "it did not look right" for a pregnant woman to be waiting on tables; they did not want to see the Complainant get hurt; and that she was eligible for unemployment insurance maternity benefits. Mark Favuzzi did not deny making these statements. He testified that the Complainant asked his father for her ROE and told Mark Favuzzi she wanted it so that she could go to the welfare office and claim benefits. This was specifically denied by the Complainant. Mark Favuzzi was unable to explain why the ROE

indicated "pregnancy" as the reason for the issuance of the ROE. Mark Favuzzi further stated that he had observed that the Complainant was slower to perform her work and had difficulty with heavy tasks during the last month or so of her employment.

The two-week schedule for March 22, 1993 until April 4, 1993 had not yet been posted by Saturday, March 20, 1993. On March 21, 1993, the Complainant testified that she called Andre Favuzzi to find out which shifts she was scheduled to work, and that he told her that business was slow and he was "going to give her a break". He also told her that she could come in to pick up her ROE. Andre Favuzzi did not deny the truth of any of these statements. He indicated that the Complainant was slow to perform her work, and that her termination coincided with a decrease in the restaurant's business. One of the Complainant's co-workers, Amy Fiset, testified that in the month following the Complainant's termination, 2 or 3 different women were hired to replace her.

The Respondents offered three explanations for the reduction in the shifts assigned to the Complainant in the March 8, 1993 - March 21, 1993 schedule and for her eventual termination. The first was that there was a slow-down in business. The second was that the Complainant could not perform all the duties of her job satisfactorily. Some of these performance issues appeared to be pregnancy-related, such as the Complainant's alleged inability to mop the floor, bus tables, fill the beer refrigerator, or wait on tables quickly enough. Other performance issues raised appeared to have nothing to do with the pregnancy, such as mixing up orders or being late for work. The Complainant denied all allegations of poor performance that were put to her in cross-examination. Testimony of the Respondents with respect to allegations not put to the Complainant in cross-examination cannot be relied on to justify her dismissal.

There was no evidence that the Complainant was ever advised of any problems with her performance. She did not request that her duties be modified, nor did she request to be assigned to particular shifts which would not require heavy duties to be performed. The Respondents did

not offer to modify her duties, assign her to morning or day shifts only, or to accommodate her in any other way that would overcome what they felt to be the detrimental impact of her pregnancy on her ability to perform and the quality of her work. Certainly no evidence was led to suggest that to have accommodated the Complainant would have caused the Respondents to suffer undue hardship.

Following the termination of her employment, the Complainant applied for unemployment insurance benefits. At this point, approximately 9 and one half weeks remained until her due date. Prior to her termination, it had been the Complainant's intention to work 7 and one half of those weeks. She did not look for other employment for this 7 and one half week period. The Complainant's testimony was that it did not seem reasonable to her to do so, since she felt that even if she could update her resume quickly and determine what job opportunities existed in the first week, she would only be able to offer a prospective employer her services for a 6-week period. The Complainant also testified that when she made her application for unemployment insurance benefits she was advised not to even bother looking for employment for such a short period of time.

THE ANALYSIS

(i) Statutory Provisions

The following provisions of the *Code* are pertinent to the determination of this case.

Part I provisions

> **5.** (1) Every person has a right to equal treatment with respect to employment without discrimination because of . . . sex . . . .

9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

Part II provisions

10.(2) The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

11.(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or

(b) it is declared in this Act, other than in section 17 [dealing with handicap], that to discriminate because of such ground is not an infringement of a right.

(2) The Commission, the board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Part IV provisions

41.(1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the board may, by order,

(a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and

(b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where

> the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10, 000, for mental anguish.
>
> **45.(1)** For the purposes of this Act, except subsection 2(2), subsection 5(2), section 7 and subsection 44(1), any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation . . . shall be deemed to be an act or thing done or omitted to be done by the corporation . . . .

(ii) Reasons for Decision

The fact that the Complainant's hours of work were reduced and her employment subsequently terminated shortly after the Respondents discovered that she was pregnant constitutes a *prima facie* contravention of s. 9 of the *Code*. The Respondents have not provided a credible explanation for their actions that would convince me they were unrelated to the fact of the pregnancy. It is well established that a discriminatory motive for an action, even if only one of many motives for that action, is sufficient to "taint" the action and constitute a contravention of the *Code*.

The Respondents' own testimony establishes that their actions with respect to the Complainant were tainted by a consideration of the fact that she was pregnant: they clearly stated that one of the reasons for the reduction in shifts and for termination was their perception that pregnancy rendered the Complainant unable to satisfactorily perform all of the job duties expected of her. Even had I been convinced that there were other rationales for their actions, I would still have found an infringement of s. 9 of the *Code* on the basis of this evidence. The evidence with respect to those other rationales was, however, not persuasive.

I do not accept that the actions taken with respect to the Complainant were precipitated by a slowdown in business. The total hours of work available for the wait staff at Andre's Restaurant are not subject to variation from week to week, except where two women may overlap for a half

hour or so during lunch. With the same number of shifts available for the roster of wait staff, fewer of them were allocated to the Complainant, and then she was terminated. Following her termination, the next schedule allocates the same number of shifts among the four remaining wait staff. Furthermore, Amy Fiset's uncontradicted testimony was that "two or three" potential replacements for the Complainant were "tried out" in the restaurant in the month following her termination.

The fact that any problems with respect to the Complainant's performance of her duties throughout her employment were not raised with her during the course of that employment, or indeed at the time of her termination, is fatal to any argument that she was terminated for these reasons, untainted by any consideration of her pregnancy.

I have already stated that on the view I take of this case, I do not need to determine whether the Complainant's pregnancy detrimentally affected her ability to perform the duties of her job. I am willing to put the evidence on this point in the best light possible for the Respondents and assume that it did. Even so, that does not justify their actions. I reject the Respondents' argument that they were under no positive obligation to accommodate the Complainant in the absence of her requesting them to do so. Had the condition necessitating the accommodation been unknown to the Respondent, my conclusion would be different. Here, they clearly knew that she was pregnant. If an ability to use an industrial mop, for example, were a *bona fide* requirement of the Complainant's job, the Respondents were under an obligation to consider what, if any, means were available to accommodate her inability to do so, and whether those means occasioned undue hardship to them. They would then have to prove to me that "we could not accommodate the Complainant's inability to mop the floor short of undue hardship".

Pursuant to s. 45(1) of the *Code*, Andre's Restaurant is liable for the actions of its sole shareholder, Andre Favuzzi. Is it also liable for the actions of Mark Favuzzi? I find that it is. Regardless of whether he is paid for his services in the restaurant, and regardless of whether those

services are performed on a full-time basis or a "moon-lighting" basis, I find that the nature of Mark Favuzzi's relationship with Andre's Restaurant was that of an employer and employee.

REMEDY

On behalf of the Complainant, the Commission sought the following remedies:

(i) a declaration that the Respondents reduced the Complainant's hours of work and subsequently terminated her employment because of pregnancy, contrary to s. 5(1) of the *Code*;

(ii) general damages in the amount of $4000.00 in respect of the Complainant's right to be free from discrimination in employment;

(iii) general damages in the amount of $5000.00 in respect of mental anguish suffered by the Complainant as a result of the Respondents wilful and reckless behaviour;

(iv) special damages in the amount of $735.00 representing the wages the Complainant would have earned had she been permitted to work 17.5 hours per week for an additional seven weeks;

(v) pre-judgment and post-judgment interest on the above amounts, calculated in accordance with the *Courts of Justice Act*, such post-judgment interest to begin to accrue 30 days after the date of this decision;

(vi) a letter of assurance to the Commission from the Respondents containing a recognizance of their obligations under the *Code* and an assurance that they will act upon their obligations and carry out their duties in the manner prescribed by the *Code*;

(vii) an order that the Respondents post cards or notices at prominent places in Andre's Restaurant where they will be accessible to all employees and customers, such notices to detail the duties and obligations of employers in Ontario under the *Code*;

(viii) a letter of apology from the Respondents to the Complainant;

(ix) an order that, within 60 days of the date of this decision, the Respondents establish a personnel policy relating to the hiring and continued employment of women and pregnant women in Andre's Restaurant and distribute such policy to all present and future employees; and

(x) that I remain seized of this matter for two years to ensure that the Respondents are complying with the remedies ordered, and that the Respondents be required, for the same two-year period, to advise the Commission of the names, addresses and last-known telephone numbers of any female wait staff terminated by Andre's Restaurant, including the length of time employed and the reason for the termination.

I deal with each of the requested remedies in turn, and in so doing, I indicate what position the Respondents took with respect to each of them. First, however, I deal with a general submission by the Respondents that because items (v), (vi), (ix) and (x) had not been requested prior to the hearing, the Commission cannot now seek those remedies. In support of this submission, he cited Rule 22 of the Board of Inquiry's Rules of Practice, which requires the Commission to prepare a Statement of Facts and Issues, including the remedies it is requesting.

Certainly, it is desirable for the Commission and Complainant to set out as specifically as possible the remedies they will be requesting from the Board. In my view, a failure to so specify does not restrict my remedial jurisdiction, which is not confined to choosing from among the remedies requested by the parties, but includes the authority to fashion remedies I find to be most appropriate to the circumstances.

The declaration requested in paragraph (i) is an appropriate one in the circumstances. I declare that the Respondents have contravened s. 5(1) of the *Code* by discriminating against the Complainant in her employment for the reason that she was pregnant.

The general damages claimed in paragraphs (ii) and (iii) are in my view excessive, and not in keeping with other damage awards made under the *Code* in similar circumstances. I find that

$2000 would be an appropriate assessment of the general damages suffered by the Complainant both in respect of her loss of the right to be free from discrimination and in respect of loss of dignity and hurt feelings. I therefore order the Respondents to pay to the Complainant the sum of $2000 in general damages. Pre-judgment interest does not accrue on this amount.

With respect to paragraph (iv), the Commission has calculated special damages to the Complainant for loss of income at $735.00. On the evidence I heard, this amount is too low. The Commission has failed to include in it the amounts the Complainant would have earned in tips during the seven week period. I find that she would have earned 7 weeks X 4 shifts X $10.00 per shift, or $280.00 during that period, for a total award of $1015.00. I am making no deduction on account of a failure to mitigate by the Complainant, because I find that in the circumstances, it was reasonable for her not to look for employment. I therefore order the Respondents to pay to the Complainant the amount of $1015.00 in respect of special damages for wage loss.

With respect to the claim for pre-judgment interest set out in paragraph (v), Respondents' counsel submitted that the Respondents should not bear the financial responsibility for the Commission's delay in processing and investigating the complaint, which the Complainant testified that she brought to the Commission's attention within a few days of her termination. This submission misses the point of pre-judgement interest, which merely recognizes that the Respondent has had available to its use money that ought properly to have been in the hands of the Complainant. In other words, the Complainant may be considered to have made an "involuntary loan" to the Respondents, for which they are now required to pay interest. Pre-judgement interest calculated in accordance with the decision in *Hallowell House Ltd.* [1980] 1 Can LRBR 499 is therefore owing on the $1015.00 in respect of wage loss. This amount is to be calculated in accordance with the following formula: half of $1015.00 X 8.3% X 3.25 years. 8.3% is the interest rate specified under the *Courts of Justice Act* as applicable to the first quarter of 1993 when the contravention of the Complainant's rights under the *Code* occurred.

I decline to award the remedies requested in paragraphs (vi) and (viii). Respondents' counsel bluntly stated that complying with such an order would be merely a "hollow gesture" on the part of his clients. In view of that statement, I can see no useful purpose in making the orders requested.

With respect to the remedy requested in paragraph (vii), I order the Respondents to post and leave posted such cards or notices as the Commission provides in prominent places in Andre's Restaurant where they will be accessible to customers and employees.

I decline to order the remedies requested in paragraphs (ix) and (x). Instead, I am ordering the Respondents to provide a copy of this decision to all present and future employees of Andre's Restaurant. I am confident that it sets out with sufficient precision the nature of an employer's obligations in Ontario with respect to its female workforce, including any pregnant women it may employ, and the possible repercussions of failing to meet those obligations.

In the event that the amounts ordered are not paid within 60 days of the date of this decision, post-judgment interest will accrue in accordance with the *Courts of Justice Act*. I will remain seized of this decision during that 60 day period.

Dated at Toronto this 21 day of June, 1996.

Mary Anne McKellar
Board of Inquiry